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No. 83-7096

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In the
Supreme Court of the United States.

DECEMBER TERM, 1983

TILLIE MOORE,
PETITIONER,

VS.

BUFFALO BOARD OF EDUCATION,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit.

Tillie M. Moore
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Questions Presented

1. Whether death of petitioner before the conclusion of her appeal will vacate her complaint since she did not receive her full rights to the United States District of New York, nor the appellate court?

2. Whether ineffective assistance of trial counsel constitutes a ground for relief from a judgement or order of a United States District Court under Rule 60(b), Subsection 6, of the Federal Rules of Civil Procedure (U.S. Code, Title 28)?

3. Whether the United States Constitutional guarantees of procedural and substantive due process in the Fifth Amendment, forbidding deprivation by the Federal government of life, liberty or property without due process of law, dictate consideration of this factor when it is cited under Rule 60(b) (6) as the sole ground for a request for rehearing of a

plaintiff's adverse decision by the
District Court which rendered that
decision.

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IN THE
SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 1983

NO. 837096

TILLIE M. MOORE,
Petitioner,

V.

BUFFALO BOARD OF EDUCATION,
Defendant-Appellee
UNITED STATES OF AMERICA
THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK

Citations to Opinions Below

There are no reported opinions below.
The brief per curiam opinions of the Court
of Appeals dismissing Petitioner's appeal
and denying her motion under Rule 60(b)
(6) and Title 28 U.S.C. 1661 are dupli-
cated as appendices to this petition.

Jurisdiction

On December 30, 1982 the United States
District Court for the Western District of
New York rendered an unreported decision
in the case in chief, dismissing

Plaintiff-Appellant's request for relief from employment discrimination by Defendant-Appellee.

On March 3, 1983 the same Federal District Court rendered an unreported decision to Plaintiff pursuant to Plaintiff's request for relief, under Rule 60(b)(6) of the Federal Rules of Civil Procedure, from the initial determination.

On September 16, 1983 the Federal Second Circuit Court of Appeals affirmed, by informal decision, the Western New York District Court's previous action in the case.

The certiorari jurisdiction of this Court is invoked pursuant to 28 United States Code, Section 1254(1).

This Court is asked to decide an important issue of federal law which should, appropriately, be settled by it.

The judgement sought to be reviewed

3.

hereby was both rendered and filed by the Federal Second Circuit Court of Appeals on September 16, 1983.

Questions Presented

1. Whether death of petitioner before the conclusion of her appeal will vacate her complaint since she did not receive her full rights to the United States District of New York, nor the appellate court?

2. Whether ineffective assistance of trial counsel constitutes a ground for relief from a judgement or order of a United States District Court under Rule 60(b), Subsection 6, of the Federal Rules of Civil Procedure (U.S. Code, Title 28)?

3. Whether the United States Constitutional guarantees of procedural and substantive due process in the Fifth Amendment, forbidding deprivation by the Federal government of life, liberty or

property without due process of law, dictate consideration of this factor when it is cited under Rule 60(b)(6) as the sole ground for a request for rehearing of a plaintiff's adverse decision by the District Court which rendered that decision.

Statutory Provisions

Amendment Five, United States Constitution states:

No person shall...be deprived of life, liberty or property, without due process of law... .

Rule 60(b), Federal Rules of Civil Procedure, Title 28 United States Code states:

(a) Clerical mistakes

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be

so corrected with leave of the appellate court.

- (b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from

a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. (As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.)

Statement of the Case

During the summer or fall of 1976 Plaintiff-Petitioner, having during a previous period of time been a school cafeteria employee for Defendant-Respondent, a municipal board of education, was rehired by Defendant to work in its school cafeteria system. There is factual dispute regarding Plaintiff's new job title designation, Plaintiff asserting that she was promised a management training position, and Defendant alleging that she was to

return to her previous cafeteria laborer category. In the interim between Plaintiff's two periods of employment by Defendant she had attended a local community college and earned a degree in food service management sufficient to qualify her to apply for supervisory, rather than laboring, food service work.

On January 26, 1977 Plaintiff filed a discrimination complaint against Defendant with the New York State Division of Human Rights, based upon Defendant's failure to either promote Plaintiff or give her the necessary on-the-job training for promotion promised and intimated in Defendant's representations to her.

On March 2, 1977 Plaintiff filed the same accusation with the Equal Employment Opportunity Commission, charging as well an impending retaliatory lay-off by Defendant because she had complained of

discrimination to the state agency. While EEOC decided to rely upon the state agency for adjudication of the original basic allegation, it found reasonable cause to believe that Plaintiff had been unlawfully discriminated against in regard to the charge of retaliation, and instituted formal conciliatory attempts. These attempts fell through because Defendant would neither cooperate nor make concessions. The Justice Department consequently issued Plaintiff a 90-day "Right to Sue" letter. The state agency, meanwhile, issued a no probable cause decision, and Plaintiff, feeling that all available relevant evidence favorable to her had not been adduced, hired an attorney to sue in Federal District Court.

That attorney used Title VII and Section 1983 for jurisdiction of the District Court complaint, but was exces-

sively dilatory in proceeding, performed little or no investigation to substantiate the complaint, was lax in discovery techniques, made no effort to reach concurrence with Plaintiff as to evidence to be presented and relevant issues to be explored, refused to acknowledge or honor her views regarding case strategy, withheld from trial presentation material evidence of which Plaintiff advised him, misinformed Plaintiff as to the import of his action and inaction, and generally presented a poor case.

The District Court ultimately dismissed Plaintiff's complaint, and Plaintiff filed a Rule 60(b) pro se motion for relief from the judgement on the ground of counsel ineffectiveness, which motion was denied, and at the time of filing the motion also filed a pro se Notice of Appeal in the Federal Second Circuit appellate court.

The appellate court found against Plaintiff solely on the basis of the weight of the evidence produced at trial.

Simultaneous with application for writ of certiorari to this Honorable Court, Plaintiff has filed, through Mrs. Florence Thompson, the attorney who represented her in submission of a reply brief and in oral argument before the Court of Appeals, a petition for rehearing on the issues specified in Section (a) supra, asking for certification of the first of the two questions to this honorable body.

Reasons for Granting the Writ

For the following Federal Constitutional reasons I believe that a dearth of effective counsel representation, unforeseeable beforehand, and amounting to a deprivation of due and fair process, should constitute grounds for total or partial rehearing of this case under

Rule 60(b)(6) of the Federal Rules of Civil Procedure.

Procedural Due Process

The "right" to, not "privilege" of, competent legal counsel in court litigation is entrenched in the American judicial system, not only in criminal cases by Constitutional mandate, but as well in civil cases by extensive historical tradition, and the recognition that some degree of actual ability is both required and expected is clear from tribunal rules regarding good standing and adequate moral character. When counsel improperly represents his client in court that client is effectively deprived of the opportunity to present witnesses or evidence to the decision maker, and of the opportunity to make an oral presentation to the decision maker, of the chance to confront and cross-examine witnesses or evidence to be

used against him, and, intrinsically, of his right to have an attorney present his case to the decision maker. All are elements of the adversary process which have been judicially recognized as being part of "due process". Inattentive and negligent counsel can turn a trial into a mockery or farce and deprive both the client and the tribunal of fundamental fairness. When the power of government is to be used in relation to an individual there is a right to a fair procedure in the determination of the basis for, and legality of, such action. When the possibility exists that someone's life, liberty or property is to be impaired, the government owes that person a fair process for the consideration of his interests.

CONCLUSION

For the reasons given a writ of certiorari should issue to review the judge-

ments dismissing and denying Petitioner's appeals, since she did not receive her full rights to the U.S. District Court of New York.

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UNDER SEPARATE COVER.

Respectfully submitted,

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